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GANAD MEDIA SDN BHD

v.

DATO' BANDAR KUALA LUMPUR (NO 1)

b

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: S5-21-35-2001]
29 JUNE 2001

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CIVIL PROCEDURE: Affidavits - Affidavits filed by deponent on behalf of defendant - Whether deponent authorised to affirm them - Whether defendant delegated with power to do so - Whether deponent had personal knowledge of the facts in issue - Federal Capital Act 1960, ss. 4(1), (6) - Local Government Act 1976, s. 107 - Advertisements (Federal Territory) By Laws 1982

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ADMINISTRATIVE LAW: Exercise of administrative powers - Local authority - Delegation of power - Whether Dato' Bandar Kuala Lumpur could delegate powers - Whether maxim delegatus non potest delegare applicable - Federal Capital Act 1960, ss. 4(1), (6) - Local Government Act 1976, s. 107 - Advertisements (Federal Territory) By Laws 1982

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The plaintiff applied, *inter alia*, to expunge the affidavits ('the affidavits') of one Zainal Abidin ('the deponent') that was filed in support of the defendant's application to set aside an ex parte injunction order. The deponent was the director of the licensing department Dewan Bandaraya Kuala Lumpur and had filed the affidavits on behalf of the defendant, the Dato' Bandar Kuala Lumpur. The issues were: (1) whether the deponent was authorised to affirm the affidavits on behalf of the defendant; and (2) whether the maxim *delegatus non potest delegare* was applicable as the defendant, to whom the discretionary power was entrusted, should exercise that power himself and not delegate it.

*f**g***Held:**

[1] Section 4(1) of the Federal Capital Act 1960 enacts that the municipal affairs of the city of Kuala Lumpur shall be administered by the defendant and s. 4(6) of the same Act allows the defendant to delegate his powers or duties to any person described by name or office. (p 704 e-h)

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[2] Based on the case of *Prithipal Singh v. Datuk Bandar Kuala Lumpur*, the delegation to the deponent to affirm all those affidavits on behalf of the defendant must be said to be an "exercise of the delegated power". By virtue of that delegated power the decision of the deponent in affirming

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those affidavits must be held to be the decision of the defendant himself. a
The decision in the Court of Appeal case of *Datuk Bandar Kuala Lumpur v. Zain Azahari Zainal Abidin* which was followed by the High Court case in *Yian Sdn Bhd v. Datuk Bandar Kuala Lumpur*, ie, that the defendant himself must affirm those affidavits must be considered to be bad in law in view of the Supreme Court case of *Prithipal Singh* above. (p 705 e-i) b

[3] Section 5(1) of the Federal Capital Act 1960 enacts that the office of Dato' Bandar Kuala Lumpur is a corporation sole. Being a corporation sole, the defendant makes its decision through individuals in accordance with the terms of the relevant statutes that confers the necessary power or direction. In the present case, the necessary power or discretion exercisable under s. 107 of the Local Government Act 1976 and the Advertisements (Federal Territory) By Laws 1982 have been delegated in accordance with s. 4(6) of the Federal Capital Act 1960 to the director of the licensing department Dewan Bandaraya Kuala Lumpur and that individual would be the deponent. (p 706 c-f) c
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[4] The deponent was the decision maker and had personal knowledge of the facts in issue. Therefore he was the right person to affirm those affidavits which were relevant to the present proceedings. (p 706 f-g)

[5] The affidavits were filed for the purpose of the interlocutory proceedings, namely, (1) to set aside the *ex parte* order for the interlocutory injunction, and (2) to resist the plaintiff's application for an *inter parte* injunction. Hence, they were certainly admissible. (p 713 g-i) e

[6] The issue of sub-delegation did not arise because the powers under s. 107 of the Local Government Act 1976 and the Advertisements (Federal Territory) By-Laws 1982 were delegated by the defendant directly to the director of the licensing department, Dewan Bandaraya Kuala Lumpur. If the relevant statute confers the necessary power to delegate, such power can readily be delegated. In the present case, as the power had been legally delegated, that could never be questioned. (p 718 g-i) f
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[Application dismissed.]

Case(s) referred to:

Blackpool Corporation v. Locker [1948] 1 KB 349 (*refd*)
Bozon v. Altrincham UDC [1903] 1 KB 547 (*refd*) h
Carltona Ltd v. Commissioners of Works [1943] 2 All ER 560 (*refd*)
Charles Bright & Co v. River Plate Construction Co [1901] 17 TLR 768 (*refd*)
Chiu Wing Wa & Ors v. Ong Beng Cheng [1994] 1 CLJ 313 (*refd*)
Cook v. Ward [1877] 2 CPD 255 (*refd*) i

- a** *Datin Melati Abdullah & Ors v. Syed Hassan Syed Salim* [1999] 5 CLJ 582 (**refd**)
Datuk Bandar Kuala Lumpur v. Zain Azahari Zainal Abidin [1997] 2 CLJ 248 (**not foll**)
Datuk TP Murugasu v. Wong Hung Nung [1988] 1 CLJ 119; [1988] 1 CLJ (Rep) 30 (**dist**)
Fadzil Mohamed Noor v. Universiti Teknologi Malaysia [1981] CLJ 85; [1981] CLJ (Rep) 53 (**dist**)
- b** *Francis v. Municipal Councillors of Kuala Lumpur* [1962] 28 MLJ 407 (**dist**)
Gilbert v. Endean [1878] 9 Ch D 259 (**refd**)
Hind v. Marquis of Hartington [1890] 6 TLR 267 (**refd**)
Horder v. Scott [1880] 5 QBD 552 (**refd**)
Hunt v. Allied Bakeries Ltd [1956] 1 WLR 1326 (**refd**)
- c** *Huth v. Clarke* [1890] 25 QBD 391 (**refd**)
Inspector-General of Police & Anor v. Alan Noor Kamat [1988] 1 MLJ 260 (**refd**)
Jones v. Insole [1891] 64 LT 763 (**refd**)
Madhya Pradesh Industries Ltd v. The Income Tax Officer, Nagpur AIR [1970] SC 1011 (**refd**)
- d** *New Zealand Fishing Industry Association Inc v. Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (**refd**)
Peek v. Peek [1948] 2 All ER 297 (**refd**)
Perumahan Farlim (Pg) Sdn Bhd & Ors v. Cheng Hang Guan & Ors [1989] 2 CLJ 967; [1989] 1 CLJ (Rep) 127 (**refd**)
Point of Ayr Collieries Ltd v. Lloyd-George [1943] 2 All ER 546 (**refd**)
- e** *Prithipal Singh v. Datuk Bandar, Kuala Lumpur (Golden Arches Restaurant Sdn Bhd, Intervener)* [1993] 4 CLJ 107 (**not foll**)
Quinn v. Leathem [1901] AC 495 (**refd**)
R v. Barnsley Metropolitan Borough Council, ex p Hook [1976] 1 WLR 1052 (**refd**)
R v. Commission for Racial Equality ex p Cottrell & Rothon [1980] 1 WLR 1580 (**refd**)
- f** *Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147 (**refd**)
Re Croasdell & Commell Laird & Co [1906] 2 KB 569 (**refd**)
Re a Debtor [1903] 19 TLR 152 (**refd**)
Re Golden Chemical Products Ltd [1976] Ch 300 (**refd**)
Re J (an infant) [1960] 1 Ch D 603 (**refd**)
Re Jerome [1907] 2 Ch 145 (**refd**)
- g** *Re Page, Hill v. Fladgate* [1910] 1 Ch 489 (**refd**)
Re S (A Barrister) [1970] 1 QB 160 (**refd**)
Rolfe v. Lawrence [1947] 63 TLR 609 (**refd**)
Rossage v. Rossage & Ors [1960] 1 All ER 600 (**refd**)
Salaman v. Warner [1891] 1 QB 734 (**refd**)
- h** *Salter Rex & Co v. Ghosh* [1971] 2 QB 597 (**refd**)
Standard Discount Co v. La Grange [1877] 3 CPD 67 (**refd**)
Stewart v. Royde [1904] 118 LT Jo 176 (**refd**)
Yian Sdn Bhd v. Datuk Bandar Kuala Lumpur & Anor [1999] 3 MLJ 605 (**not foll**)
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Legislation referred to:

Federal Capital Act 1960, s. 4(1), (6), 5(1)
Local Government Act 1976, s. 107
Municipal Ordinance, s. 16(5)
Rules of the High Court 1980, O. 41 r. 5(2)

Other source(s) referred to:

Jeffrey Pinsler, *Civil Procedure*, 1994 edn, p 38
Malaysian Court Practice, p 2518

For the plaintiff - CT Annathurai; M/s Hamzah, Sulaiman & Partners

For the defendant - Thangaraj Balasundram; M/s Thangaraj & Assoc

Reported by Usha Thiagarajah

JUDGMENT

Abdul Malik Ishak J:

Introduction

By way of a summons-in-chambers in encl. 21 which was dated 5 March 2001 and filed on the same date, the plaintiff sought for the following orders:

- (a) that the affidavit of Zainal Abidin bin Md Zain that was affirmed on 2 March 2001 as seen in encl. 13 which was filed in support of the application by the defendant by way of a summons-in-chambers dated 2 March 2001 as reflected in encl. 10 for, *inter alia*, an order that the *ex parte* injunction dated 24 February 2001 be set aside, be expunged.
- (b) that all the affidavits filed by the defendant should be affirmed by the defendant in person and not by any other officer.
- (c) that the costs of this application be borne by the defendant and payable to the plaintiff.
- (d) any other order which this court deems fit and fair.

Who is Zainal Abidin bin Md Zain? He is the director of the licensing department dewan bandaraya, Kuala Lumpur and he was the deponent of the affidavit in encl. 13. He too played prominent roles in affirming other affidavits and filing them on behalf of the defendant as seen in the court file.

Was Zainal Abidin Bin Md Zain Authorised To Affirm Those Affidavits?

This would be the crucial question of the day. The Court of Appeal in *Datuk Bandar Kuala Lumpur v. Zain Azahari bin Zainal Abidin* [1997] 2 CLJ 248

a at p. 270 observed:

There is another aspect to this principle. It is that the affidavit, in order to amount to a satisfactory rebuttal, must be affirmed by the person who has personal knowledge of the facts in issue. In cases where the exercise of discretion by a public decision-maker is challenged, in the absence of those special circumstances which we referred to a moment ago, the rebuttal must come from the decision-maker himself. An affidavit by a deponent who has no personal knowledge of the considerations upon which the decision was based is pure hearsay and is worthless as evidence and no court can be expected to pay the slightest attention to it.

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c and this was dutifully followed by the High Court case of *Yian Sdn Bhd v. Datuk Bandar Kuala Lumpur & Anor* [1999] 3 MLJ 605. However, would it be correct to say as was said by the Court of Appeal in *Datuk Bandar Kuala Lumpur v. Zain Azahari bin Zainal Abidin (supra)* that an affidavit would constitute “satisfactory rebuttal” if that affidavit is affirmed by someone who

d “has personal knowledge of the facts in issue?” Put in another way, must the defendant himself affirm those affidavits?

I must now go to the basics. It would certainly be justifiable to ascertain whether the defendant can legally delegate his powers to someone else. For this exercise, some statutes must be referred to. Section 4(1) of the Federal Capital Act 1960 enacts that the municipal affairs of the city of Kuala Lumpur shall be administered by the defendant and, for convenience, I shall now reproduce that sub-section:

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f (1) The municipal affairs of the City of Kuala Lumpur shall be administered by the Commissioner of the City of Kuala Lumpur.

Section 4(6) of the Federal Capital Act 1960 allows the defendant to delegate his powers or duties to any person described by name or office and it would likewise be ideal to reproduce that sub-section:

g (6) Where by or under this Act or any other written law the Commissioner is empowered to exercise any powers or perform any duties he may by instrument in writing delegate, subject to such conditions and restrictions as may be prescribed in such instrument, the exercise of such powers or the performance of such duties to any person described by name or office:

h Provided that nothing in this section shall apply to any power to make any subsidiary legislation conferred upon him by or under this Act or any other written law.

It would be germane to note that the powers under s. 107 of the Local Government Act 1976 and that of the Local Government Act 1976

i Advertisements (Federal Territory) By Laws 1982 have been delegated to the

director of the licensing department, dewan bandaraya, Kuala Lumpur *vide* the Government gazette Jil. 35, No: 25 Tambahan No: 3, dated 5 December 1991 bearing number 11804 as exhibited and annexed as “ZA1” to the affidavit in reply in encl. 11, particularly at p. 43 thereof. a

Of significance would be the case of *Prithipal Singh v. Datuk Bandar, Kuala Lumpur (Golden Arches Restaurant Sdn Bhd, Intervener)* [1993] 4 CLJ 107 SC, a decision of the then Supreme Court with a strong coram of Abdul Hamid Omar LP, Eusoff Chin and Peh Swee Chin SCJJ. Eusoff Chin SCJ (as he then was) when delivering the judgment of the then Supreme Court had this to say in regard to the power of delegation (see p. 111 of the report): b

We find that the Federal Capital Act 1960 does not require that the instrument of delegation must be in any special form. It is therefore sufficient if words used in the instrument of delegation are expressed in clear language to show that the Datuk Bandar, by that instrument intended to delegate his functions to the director and deputy director of the valuation department. These are experienced and competent officers whom the Datuk Bandar trust to execute the delegated functions effectively. The act of delegating his functions exercised by the Datuk Bandar is purely an administrative act and not a legislative one. By that delegation, the Datuk Bandar had put someone in his place to do what he is authorised to do by s 19 of the Act. Consequently, any decision of Encik Wan Kat Few in the exercise of the delegated power was the decision of the Datuk Bandar. c

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which must necessarily mean that the delegation to Zainal Abibin bin Md Zain to affirm all those affidavits on behalf of the defendant must be said to be an “exercise of the delegated power”. It was perfectly legitimate on the part of Zainal Abidin bin Md Zain to affirm those affidavits. It was a fallacy to assume that there is a legal requirement for the defendant himself to affirm those affidavits. That fallacy, if at all it exists, must now be relegated into oblivion. The clear words of Eusoff Chin SCJ (as he then was) in *Prithipal Singh (supra)* have put an end to the misguided fallacy. f

In my judgment, applying vigorously the principle of law as enunciated in *Prithipal Singh (supra)* and by virtue of that delegated power the decision of Zainal Abidin bin Md Zain in affirming those affidavits must be held to be the decision of the defendant himself – viz, the Dato' Bandar Kuala Lumpur. Nicely put, the maker of that decision would be Zainal Abidin Bin Md Zain while the decision made by the latter would be the decision of the Dato' Bandar Kuala Lumpur. Now, that part of the decision of the Court of Appeal in the case of *Datuk Bandar Kuala Lumpur v. Zain Azahari bin Zainal Abidin (supra)* in regard to the requirement that the defendant himself must affirm those affidavits must be considered to be bad in law in view of the decision of the then Supreme Court in *Prithipal Singh*. Incidentally, the Court of Appeal g

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- a* decision in *Datuk Bandar Kuala Lumpur v. Zain Azahari bin Zainal Abidin (supra)* was decided on 17 February 1997 while the High Court case of *Yian Sdn Bhd v. Datuk Bandar Kuala Lumpur (supra)* was decided on 7 June 1999 and these two cases did not consider the Supreme Court case of *Prithipal Singh (supra)* that was decided on 13 September 1993. This was indeed
- b* unfortunate. Had the Court of Appeal and the High Court in those two cases considered *Prithipal Singh*, perhaps the outcome on that one point might be different.

- Another interesting feature to highlight would be this. Section 5(1) of the Federal Capital Act 1960 enacts that the office of Dato' Bandar Kuala Lumpur
- c* is a corporation sole and the original text of that provision reads as follows:

(1) The Commissioner shall be for all purposes a corporation sole under the name of 'Dato' Bandar Kuala Lumpur' or, in English, the 'Commissioner of the City of Kuala Lumpur'.

- d* Being a corporation sole, the defendant makes its decision through individuals in accordance with the terms of the relevant statutes that confers the necessary power or discretion. In the context of the present case, as alluded to above, the necessary power or discretion exercisable under s. 107 of the Local Government Act 1976 and the Local Government Act 1976 Advertisements
- e* (Federal Territory) By-Laws 1982 have been delegated in accordance with s. 4(6) of the Federal Capital Act 1960 to the director of the licensing department dewan bandaraya, Kuala Lumpur and that individual would be in the person of Zainal Abidin bin Md Zain. That would be the legal scenario governing the decisions made by Zainal Abidin bin Md Zain and that being
- f* the case the right person to affirm those affidavits would be Zainal Abidin bin Md Zain and no one else. It is opportune, at this juncture, to apply some passages that appear in the judgment of the Court of Appeal in *Datuk Bandar Kuala Lumpur v. Zain Azahari bin Zainal Abidin (supra)* that would be beneficial to the defendant and those passages were produced in the early part of this judgment. Applying those passages generously to the factual matrix of
- g* the present case, it would be correct to say and I so say that Zainal Abidin bin Md Zain is the decision maker, and in that glorious position he "has personal knowledge of the facts in issue" and thus he was the right person to affirm those affidavits which were relevant to the present proceedings.
- h* The present case reflects the need to be practical. Convenience and necessity often demand that a public authority should work through committees, executive officers and other such like agencies. As a matter of practice, Government demands a great deal of delegation and the present case is no exception. As demonstrated, the delegation in the present case was expressly
- i* authorised by statute. According to the case of *Cook v. Ward* [1877] 2 CPD

255 as well as the case of *Blackpool Corporation v. Locker* [1948] 1 KB 349, the delegate must always keep within the bounds of the power that was actually delegated, and that delegated power may be narrower than that possessed by the delegating authority. These two cases too laid down the principle that it will be no defence to say that that authority could, had it wished, have delegated wider power. In the context of the present case, the delegation was quite wide as exemplified in the Government gazette marked as "ZA1" of encl. 11. a
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In *Carltona Ltd v. Commissioners of Works* [1943] 2 All ER 560, the owner of a factory challenged a wartime requisitioning order made on behalf of the Commissioners of Works – as the ministry was then called. The Commissioners had power to requisition land "if it appears to that authority to be necessary or expedient to do so". But the Commissioners themselves never met or transacted business as a body; their powers were exercised entirely by their officials. The requisitioning order was signed by an assistant secretary, who was solely in charge of the case, and it was never considered by the Commissioners. The Court of Appeal held that this procedure was open to no legal objection. Lord Greene MR at p. 563 of the report, aptly said: c
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It cannot be supposed that this regulation meant that, in each case, the minister in person should direct his mind to the matter. The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is, of course, the decision of the minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority ... e
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It would also be ideal to read the following cases:

- (1) *Point of Ayr Collieries Ltd v. Lloyd-George* [1943] 2 All ER 546; and
- (2) *Re Golden Chemical Products Ltd* [1976] Ch 300. g

It must be recalled that under s. 4(6) of the Federal Capital Act 1960, the present defendant is allowed to delegate his powers or duties to any person described by name or office. This was done and it was delegated to Zainal Abidin bin Md Zain by virtue of his office.

For all these reasons, the answer to the question posed would be in the positive. That would put an end to encl. 21 forthwith. Lest I be accused of an oversight, I must now consider the other issues that were raised by the parties, but not in its order of priority. h

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a Interlocutory Proceedings

b An argument was advanced by the defendant that the affidavits of Zainal Abidin bin Md Zain were filed in the present proceedings for the purpose of interlocutory proceedings and, on this basis, it was pointed out that the affidavits of this individual must be rendered admissible. Indeed the summons-in-chambers dated 23 February 2001 in encl. 5 that was filed by the plaintiff for an *ex parte* interim injunction, the summons-in-chambers dated 2 March 2001 in encl. 10 that was filed by the defendant to set aside the *ex parte* order dated 24 February 2001, and, finally, the summons-in-chambers in encl. 17 dated 2 March 2001 filed by the plaintiff for an *inter partes* interim injunction were all in the nature of interlocutory proceedings. Lee Hun Hoe CJ (Borneo) in *Perumahan Farlim (Pg) Sdn Bhd & Ors v. Cheng Hang Guan & Ors* [1989] 2 CLJ 967; ([1989] 1 CLJ (Rep) 127) SC had occasion to consider the meaning to be attached to the word “interlocutory”. At p. 975 (at p. 134) of the report, this was what his Lordship had to say:

d The object of an interlocutory interim injunction is to preserve matters in *status quo* until the case be tried. Such an injunction is therefore usually so framed as to continue in force until the hearing of the cause or until further order. It cannot be considered in argument as affecting the ultimate decision of a cause. In *Gilbert v. Endean* [1878] 9 Ch D 259 at pp 268-9, the matter was clearly stated by Cotton LJ at p 268:

e ... those applications only are considered interlocutory which do not decide the rights of parties, but are made for the purpose of keeping things in *status quo* till the rights can be decided, or for the purpose of obtaining some direction of the court as to how the cause is to be conducted, as to what is to be done in the progress of the cause for the purpose of enabling the court ultimately to decide upon the rights of the parties.

f The same matters before us were argued in the court below. The learned judge had dealt with them in some detail. We have not been persuaded that the learned judge was wrong. We have no reason to interfere with his decision.

g Accordingly, we would dismiss the appeal with costs. Deposit to the defendants on account of taxed costs.

h Of course what Cotton LJ said in *Gilbert v. Endean* [1878] 9 Ch D 259 was correct. Applications which are interlocutory would certainly not decide the rights of the parties. Jeffrey Pinsler in his book entitled, “*Civil Procedure*”, a 1994 edn, echoed the same sentiments at p. 38 thereof:

i The importance of the interlocutory proceeding lies in the availability and willingness of the court to grant interim relief when appropriate and to ensure that in any situation, the interests of justice are fully served. In most situations, this jurisdiction is brought into being by the application of a party in relation to a particular issue or problem, and therefore initiative is a vital element in the interlocutory process.

The test to determine whether an order is interlocutory or final can be found in the case of *Bozon v. Altrincham U.D.C.* [1903] 1 KB 547, 548. There Lord Alverstone CJ said: **a**

Does the ... order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order, but if it does not, it is then, in my opinion, an interlocutory order. **b**

Lord Denning MR in *Salter Rex & Co. v. Ghosh* [1971] 2 QB 597 held the view that the test to determine whether an order is final or interlocutory is in the nature of the application to the court, and not in regard to the nature of the order made. In deciding the way he did, Lord Denning MR seemed to agree with the decisions of Lord Esher MR in *Standard Discount Co. v. La Grange* [1877] 3 CPD 67 and in *Salaman v. Warner* [1891] 1 QB 734, but Lord Denning MR seemed to disagree with the view of Lord Alverstone CJ in *Bozon v. Altrincham UDC (supra)*. Be that as it may, examples of interlocutory orders are quite numerous and they may be itemised, briefly, in this way: **c**

- (1) An order vesting the plaintiff with the power to sign a final judgment under O. 14 (*Re a Debtor* [1903] 19 TLR 152; and *Rolfe v. Lawrence* [1947] 63 TLR 609); **d**
- (2) An order staying proceedings against one of the several defendants (*Hind v. Marquis of Hartington* [1890] 6 TLR 267 CA); **e**
- (3) An O. 18 r. 19 application, dismissing an action as being frivolous or vexatious or disclosing no cause of action (*Jones v. Insole* [1891] 64 LT 763, CA; *Charles Bright & Co. v. River Plate Construction Co* [1901] 17 TLR 768 CA; *Re Page, Hill v. Fladgate* [1910] 1 Ch 489 CA; and *Hunt v. Allied Bakeries, Ltd* [1956] 1 WLR 1326 CA); **f**
- (4) An order for security for costs to be given within a specified time, otherwise the action would be dismissed (*Stewart v. Royde* [1904] 118 LT Jo. 176 CA); **g**
- (5) An order directing a new trial to be held (*Peek v. Peek* [1948] 2 All ER 297);
- (6) An order setting aside the award of an arbitrator (*Re Croasdell & Commell Laird & Co* [1906] 2 KB 569); and **h**
- (7) An order to dismiss an application to review taxation (*Re Jerome* [1907] 2 Ch. 145, CA).

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- a* On the strength of these authorities, I would accordingly hold that encl. 21 was in the nature of an interlocutory proceeding.

Another point worth considering would be this. That affidavits sworn for the purpose of being read in interlocutory proceedings may contain statements of information or belief. In this connection, reference to O. 41 r. 5(2) of the RHC ought to be referred to:

- b* An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.
- c* Certain passages which appear in the *Malaysian Court Practice*, at p. 2518 merit reproduction and it would not be out of place to reproduce them:

d A major exception concerns the use of affidavits in interlocutory proceedings. It is provided that an affidavit which is sworn for the purpose of being used in interlocutory proceedings may include statements concerning matters which the deponent is not personally aware of but of which he was informed by other persons. In such situations, it is necessary to state the sources of such information and that the deponent believes such information to be true. 'The purpose (of the exception) is to enable a deponent to put before the court in interlocutory proceedings, frequently in circumstances of great urgency, facts which he is not able of his own knowledge to prove but which, the deponent is informed and believes, can be proved by means which the deponent identifies by specifying the sources and grounds of his information and belief': per Gibson J in *Savings and Investment Bank Ltd v. Gasco* [1948] 1 WLR 271 at 282. Also see *Dynacast (S) Pte Ltd v. Lim Meng Siang & Ors* [1989] 2 CLJ 1116; [1989] 2 CLJ (Rep) 900, HC S'pore. In *Gilbert v. Endean* [1878] 9 Ch D 259 it was stated that applications are only considered interlocutory which do not decide the rights of the parties, but are made for the purpose of keeping the *status quo* until the rights can be decided, or for the purpose of obtaining some direction of the court as to how the case is to be conducted, as to what is to be done in the progress of the cause for the purpose of enabling the court ultimately to decide upon the rights of the parties', per Cotton LJ at 268. This *dicta* was also applied in *Rossage v. Rossage* [1960] 1 WLR 249; *Re J (an infant)* [1960] 1 All ER 603; *Nationwide Building Society v. Bateman* [1978] 1 All ER 999; *MUI Bank Bhd v. Alkner Investments Pte Ltd* [1990] 3 MLJ 385, HC S'pore; *Perumahan Farlim (Pg) Sdn Bhd & Ors v. Cheng Hang Guan & Ors* [1989] 2 CLJ 967; [1989] 1 CLJ (Rep) 127, SC. See also *Bird v. Lake* [1863] 1 Hem & M 111. An application to enter judgment in default of appearance under O. 70 r. 20(3) is intended to decide the rights of the parties and accordingly is not an interlocutory proceeding: *The Ocean Jade* [1991] 2 MLJ 385, HC S'pore.

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On the meaning to be attached to the words “interlocutory proceedings”, three authorities must be referred to. Firstly, it would be the case of *Datin Melati Abdullah & Ors v. Syed Hassan Syed Salim* [1999] 5 CLJ 582 where the court said at p. 585 of the report: **a**

Order 41 r. 5(2) of the RHC states as follows: **b**

An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.

and the meaning to be attached to the words ‘interlocutory proceedings’ must surely be circumscribed by the word ‘interlocutory’ which in essence refer to those applications which do not decide the rights of the parties (*Gilbert v. Endean* [1878] 9 Ch 259; *Rossage v. Rossage* [1960] 1 WLR 249 CA; and *Re J (An Infant)* [1960] 1 WLR 253, [1960] 1 All ER 603). **c**

Secondly, the case of *Re J. (an infant)* [1960] 1 Ch. D 603 must be referred to where Cross J said at p. 604 of the report: **d**

Counsel for the applicant admitted that for some purposes an application such as the mother’s application in this case was an interlocutory proceeding. He agreed, for example, that an order made on it would be an interlocutory and not a final order for the purposes of appeal. Directions given in infancy cases are never irrevocable but are always liable to be varied in the light of changed circumstances. The only final order in such proceedings would be one directing that the child should cease to be a ward of court. But he argued that a proceeding might well be interlocutory for the purposes of appeal while not being interlocutory for the purposes of the admission of hearsay evidence. In this connexion he referred me to a passage in the judgment of Cotton, LJ, in *Gilbert v. Endean* [1878] 9 Ch.D. 259, where the lord justice said in connexion with an earlier form of a rule in question (1878), 9 Ch. D at p. 268: **e**

... for the purpose of this rule those applications only are considered interlocutory which do not decide the rights of parties, but are made for the purpose of keeping things *status quo* till the rights can be decided, or for the purpose of obtaining some direction of the court as to how the cause is to be conducted, as to what is to be done in the progress of the cause for the purpose of enabling the court ultimately to decide upon the rights of the parties. Now many of the cases which are brought before the court on motions and on petitions, and which are therefore interlocutory in form, are not interlocutory within the meaning of that rule as regards evidence. They are to decide the rights of the parties, and whatever the form may be in which such questions are brought before the court, in my opinion the evidence must be regulated by the ordinary rules, and must be such as would be admissible at the hearing of the cause. **f**

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- a** Counsel for the applicant pointed out that the mother's application here was not made for the purpose of keeping matters 'in *status quo*' or for the purpose of obtaining directions as to procedure. Therefore, he submitted, it should not be considered to be an interlocutory proceeding for the purpose of the admission of evidence. Counsel for the respondent, on the other hand, argued that, while it was true that the mother's application was not made for the purpose of keeping things in *status quo*, or for directions with regard to procedure, it was not an application on which any rights of any parties would be decided. The only question to be decided would be what, in all the circumstances, would be in the best interests of the infant who is not himself a party at all. The parties in such a case are not asserting rights but merely submit to the judge what, in their view, is for the infant's benefit.
- b** The observations of Cotton, LJ, therefore, said counsel for the respondent, do not touch such a case as this, and as the proviso to the rule (which up to 1933 was confined to motions) now extends to all forms of proceeding, there is no reason why such an application as the mother's in this case should not be considered to be interlocutory for the purposes of evidence as well as for the purposes of appeal. He submitted that it was desirable that the judge who had to decide what, in all the circumstances, was in the best interests of the child should be able to consider any material which either side chose to put before him and that he could safely be trusted not to attribute to any part of it more weight than it deserved.
- c**
- d**
- e** Thirdly, reference to the case of *Rossage v. Rossage And Others* [1960] 1 All ER 600 CA would be ideal. There Hodson LJ observed at p. 601 to p. 602 of the report:
- This rule has been construed by the Court of Appeal in a way which draws a distinction between interlocutory proceedings generally and interlocutory proceedings where an issue has to be determined, such as arises in this case. The authority for that is contained in *Gilbert v. Endean* [1878] 9 Ch. D 259, a decision of the Court of Appeal, which contains a passage from Cotton, LJ's judgment which is in point. Dealing with an earlier form of this rule (Before it was amended by RSC (No. 2), 1933, the rule provided that affidavits should be confined to such facts as 'the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, with grounds thereof, may be admitted'. The words here printed in italics have now been replaced by the proviso printed at letter A, *supra*) Cotton, LJ, said [1878] 9 Ch. D at p. 268:
- f**
- g**
- h** ... for the purpose of this rule those applications only are considered interlocutory which do not decide the rights of parties, but are made for the purpose of keeping things in *status quo* till the rights can be decided, or for the purpose of obtaining some directions of the court as to how the cause is to be conducted, as to what is to be done in the progress of the cause for the purpose of enabling the court ultimately to decide upon the rights of the parties. Now many of the cases which
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are brought before the court on motions and on petitions, and which are therefore interlocutory in form, are not interlocutory within the meaning of that rule as regards evidence. They are to decide the rights of the parties, and whatever the form may be in which such questions are brought before the court, in my opinion the evidence must be regulated by the ordinary rules, and must be such as would be admissible at the hearing of the cause. In my opinion, therefore, on such applications, if an affidavit on information and belief is made, the other side is not called upon to answer it under the peril of its being said to him, 'You have in fact admitted this by not denying it, and therefore the court may act upon the admission'. But I must add this: where in the court below the evidence not being strictly admissible, not being that upon which the court can properly act, if the person against whom it is read does not object, but treats it as admissible, then before the Court of Appeal, in my judgment, he is not at liberty to complain of the order on the ground that the evidence was not admissible. But in such a case the court does not act on the statement as being evidence properly admissible, but because the party has by the course which he adopted waived proof of the facts stated on information and belief. I have said this because I think that the matter is one of very considerable importance, and that the habit of introducing into applications to decide the rights of parties evidence on information and belief has done great injury in many ways in the Chancery Division.

In my judgment, the standard to be applied is indicated by the rule as explained by the passage to which I have referred; and the learned judge quite clearly, from what we have been told of the matter, recognised that the material to which I have drawn attention (without saying what it is) was matter which he could not consider for the purpose of arriving at a decision in this case. However, he said he was not going to remove it from the file because he was quite capable of shutting his mind to the irrelevant matter. I do not think that that is a sufficient answer to the application in this case. The peril of leaving the affidavits on the file is indicated by the passage in Cotton, LJ's judgment which I have read; and indeed it makes it almost impossible for the mother in this case to answer the affidavits unless they are purged of the irrelevant and indeed scandalous matter.

Indeed applying all these authorities it would not be wrong to say that the affidavits of Zainal Abidin bin Md Zain were filed for the purpose of the interlocutory proceedings, namely:

- (1) to set aside the *ex parte* order for the interlocutory injunction; and
 - (2) to resist the plaintiff's application for an *inter parte* injunction,
- and they were certainly admissible.

a The Authorities Relied Upon By The Plaintiff's Solicitors

A great deal of emphasis was placed by the plaintiff to the Court of Appeal case of *Datuk Bandar Kuala Lumpur v. Zain Azahari bin Zainal Abidin (supra)* and the High Court case of *Yian Sdn Bhd v. Datuk Bandar Kuala Lumpur & Anor (supra)*. These two cases must be read in the context of what Mohamed Azmi SCJ said in *Chiu Wing Wa & Ors v. Ong Beng Cheng* [1994] 1 CLJ 313 SC, particularly at p. 319 thereof:

b Without any intention of undermining the principle of *stare decisis* as laid down by Lord Scarman in *Duport Steel Ltd v. Sirs* [1980] 1 All ER 529; [1980] 1 WLR 142 at p 551C, it is important that decided cases should not be followed blindly. As stated by Lord Halsbury in *Quinn v. Leathem* [1901] AC 495 at p 506:

c ... every judgment must be read as applicable to the particular facts proved, since the generality of expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found.

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and what was said by Lord Halsbury in *Quinn v. Leathem* [1901] AC 495 at p. 506 as alluded to above would be of universal application.

e Treading cautiously, I have this to say in regard to *Zain Azahari's* case. There the Court of Appeal relied on the following cases:

- (1) *New Zealand Fishing Industry Association Inc. v. Minister of Agriculture and Fisheries* [1988] 1 NZLR 544;
- f** (2) *R v. Barnsley Metropolitan Borough Council, ex p Hook* [1976] 1 WLR 1052;
- (3) *Madhya Pradesh Industries Ltd v. The Income Tax Officer, Nagpur* AIR [1970] SC 1011; and
- g** (4) *Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147.

h but, with respect, these cases were related to an application for *certiorari* where the decision makers have failed to file affidavits. Whereas here in the present case by way of delegation the decision maker in the person of Zainal Abidin bin Md Zain filed affidavits and these affidavits can be seen in the court file. The present case too was set against the background of an injunctive order and it was not based on *certiorari*.

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In *Zain Azahari's* case, there was an admission that the decision was made by the Dato' Bandar Kuala Lumpur himself. At p. 260 of the report, the Court of Appeal had this to say: *a*

After completing the inquiry, the officer concerned sent all the papers to the appellant to make a decision. That is because the appellant had reserved unto himself the power to make the ultimate decision whether or not to grant planning permission to Tradium. *b*

Whereas in the present case, the decision of the defendant was made by the director of the licensing department in the person of Zainal Abidin bin Md Zain who was the decision maker and whose decision was that of the defendant – Dato' Bandar Kuala Lumpur, which was and still is a corporation sole. *c*

In *Yian Sdn Bhd v. Datuk Bandar Kuala Lumpur & Anor (supra)*, the instrument that delegated the powers of the defendant was not exhibited nor brought to the attention of the High Court. At p. 614 of the MLJ reporting, the High Court said: *d*

In short the deponent is saying that they know what they are doing. In any event there is no such relevant gazette notification as cited by Haji Mokhtar in the said affidavit. *e*

Whereas in the present case, the gazette notification was alluded to in the affidavit in encl. 11 and it was also annexed as an exhibit bearing number "ZA1".

Another significant point to note would be this. That *Zain Azahari* and *Yian Sdn Bhd* cases were concerned with *certiorari* where the final rights of the parties would be decided once and for all. The present case was not so. It revolved, as I said, on an injunctive application. It would be ideal to reiterate the following factual matrix: *f*

(1) That Dato' Bandar Kuala Lumpur is a corporation sole and whatever decisions made on its behalf by individuals would be made by those individuals who have been conferred powers under and in accordance with statute. It was in the nature of a delegation under the statute. That delegated power was conferred on Zainal Abidin bin Md Zain and he was the decision maker of the day. *g*

(2) As the director of the licensing department, dewan bandaraya, Kuala Lumpur, Zainal Abidin bin Md Zain received the delegated power to act by virtue of his office under s. 4(6) of the Federal Capital Act 1960 and thus the decisions made by him in his official capacity were that of the defendant and that would equally be true in regard to the affidavits affirmed by Zainal Abidin bin Md Zain. *h*

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- a* (3) All the affidavits affirmed by Zainal Abidin bin Md Zain were so affirmed on behalf of the defendant in the interlocutory proceedings.

Delegatus Non Potest Delegare

- b* This is a latin maxim. It means that a delegate cannot devolve the duty or power delegated to him upon another. According to the case of *Huth v. Clarke* [1890] 25 QBD 391 a person to whom a power, trust or authority is given to act, on behalf or for the benefit of another, cannot delegate it unless he is authorised to do so. A delegate cannot delegate. Put it in another way, an official to whom discretionary power has been entrusted must exercise the power himself. Using this latin maxim as a leverage, it was strenuously argued
- c* that the defendant cannot delegate its power and that power must be exercised by the defendant and no one else. My attention was drawn to a string of authorities which applied this latin maxim. In *Fadzil bin Mohamed Noor v. Universiti Teknologi Malaysia* [1981] CLJ 85; [1981] CLJ (Rep) 53 FC, the then Federal Court ruled that under the University and University Colleges Act 1971, disciplinary power over the university staff members was exercisable
- d* only by the Disciplinary Committee and not in the University Council which acted as an appellate forum against the decision of the Disciplinary Committee. Since the functions of the two bodies were separate and distinct, the exercise of disciplinary jurisdiction by the University Council in dismissing a lecturer was held to be invalid. Raja Azlan Shah CJ (Malaya) (as His Majesty then
- e* was) writing for the then Federal Court in style said at p. 198 of the report:

- f* The University was incorporated under Act 30 of 1971. It is a corporate body, and as such it can only do such acts as are authorised directly or indirectly by the statute creating it: see *Attorney-General v. Leeds Corporation* [1929] 2 Ch. 291. In *Public Textiles Bhd. v. Lembaga Letrik Negara* [1976] 2 MLJ 58 this court said in relation to a corporation that whatever is not permitted expressly or by necessary implication by the incorporating statute is prohibited not by the express or implied prohibition of the legislature but by the principle of *ultra vires*. Therefore the university authority can only act in pursuance of the powers given to it by law. It follows that it has to follow proper procedure
- g* as prescribed by law before condemning an erring member of the staff. If it goes outside its limit of operation, or is not warranted by it, then any decision made by it is *ultra vires*.

- h* To elaborate somewhat, the University Council in the present case is the executive body of the university. It may exercise all the powers conferred on the University by Act 30 of 1971 or the Constitution. But such powers are circumscribed. Subsection (2) of section 7 of the Act enacts 'unless otherwise expressly provided by this Act or the Constitution.' The general powers of the University Council do not by virtue of section 16A of the Act extend to disciplinary matters. Such matters are conferred on and vested in the
- i* Disciplinary Committee alone. That committee must itself take the responsibility

of deciding a disciplinary case, that is to say, the charge and the consequences of a positive finding upon it. The University Council's limited role in this matter is as an appellate body exercising judicial function for the determination of appeals from any decisions of the Disciplinary Committee. It is, therefore, obvious that the functions of these two bodies are separate and distinct. The Act deals with the situation in language which could scarcely be plainer. And it pointedly omits any reference to delegation. It prescribes the bodies who are to be the disciplinary authority and the appellate authority. Such being their respective jurisdiction, we are of the opinion that the purported exercise of jurisdiction by the University Council in dismissing the appellant was *ultra vires* its powers. The University Council was purporting to do the very thing which, by Act 30 of 1971 and the Constitution, it was prohibited from doing.

In *Francis v. Municipal Councillors Of Kuala Lumpur* [1962] 28 MLJ 407, the Privy Council held that where under the relevant law, the power to dismiss an employee of the Municipal Corporation was vested in the President, then the dismissal of an employee by the Council and not the President was said to be *ultra vires*.

In *Datuk T.P. Murugasu v. Wong Hung Nung* [1988] 1 CLJ 119; [1988] 1 CLJ (Rep) 30, the then Supreme Court quashed the suspension of a football player who was suspended for life on certain charges by the executive committee because under the constitution of the Football Association of Malaysia, disciplinary jurisdiction in all cases of misconduct and infringement of the Constitution was vested in the disciplinary committee and not the executive committee.

In *Inspector-General Of Police & Anor v. Alan Noor bin Kamat* [1988] 1 MLJ 260 SC, the then Supreme Court held that where the Inspector General of Police was authorised to take disciplinary action against all senior police officers, the Deputy Inspector General was not competent to take any such action against any such officer.

And so using these diverse authorities emanating from the apex courts in this country as well as from the Privy Council, it was reiterated with vigour and vitality that the latin maxim when read in its correct perspective would simply mean that the present defendant to whom the discretionary power was entrusted must exercise that power himself and must not delegate it.

It would be correct to say that in the case of statutory powers the crucial question to pose would be whether on a true construction of the statute, it is intended that a power conferred upon say Ali may be exercised on Ali's authority by Bob. The latin maxim merely indicates that this was not normally allowable (*Re S. (A Barrister)* [1970] 1 QB 160) but the question of the true intent of the statute remains to be interpreted. In most cases, the vital question to ask is whether the statutory discretion remains in the hands of the proper

- a* authority, or whether some other person purports to exercise it. Thus, in *Horder v. Scott* [1880] 5 QBD 552 the relevant Act stipulated that an inspector of nuisances “may procure any sample” of goods for analysis and the court held that the inspector might validly send his assistant to buy a sample of coffee notwithstanding the fact that the inspector had in no way authorised his
- b* assistant to exercise the discretion reposed in himself. Likewise in *R. v. Commission for Racial Equality ex p. Cottrell & Rothon* [1980] 1 WLR 1580, the court held that there can be no objection to the Commission for Racial Equity using its officers to collect information in its investigations. Be that as it may, as I said the statute must be looked at. It is pertinent to note that
- c* any corporate body or corporation sole created by statute can only perform such acts as are authorised directly or indirectly by the statute creating it. All these are general statements of the law. At the end of the day, in the context of the present case, the germane question to pose would be: whether the powers of the Dato’ Bandar Kuala Lumpur can be delegated? As alluded to
- d* in the early part of this judgment, such powers are clearly set out in s. 4(6) of the Federal Capital Act 1960 and the answer would certainly be in the positive.

- In my judgment, the latin *maxim delegatus non potest delegare* should not apply to the facts of our case. Here, in law, the powers of the Dato’ Bandar
- e* Kuala Lumpur can be delegated and was in fact lawfully delegated (see the Supreme Court decision of *Prithipal Singh v. Datuk Bandar, Kuala Lumpur (Golden Arches Restaurant Sdn Bhd, Intervener)* (*supra*)). Even at the High Court level, Wan Adnan J (as he then was) in *Prithipal Singh v. Datuk Bandar Kuala Lumpur (Golden Arches Restaurant Sdn Bhd, Intervener)* [1993] 4 CLJ
- f* 107 rightly said of the report:

It is clear that the delegation was made under section 4(6) and not section 4(7). The mention of section 4(7) in the perwakilan kuasa was merely to show how Elyas Omar who was at that time the Secretary General of the Ministry of the Federal Territory became vested with the powers and duties of Datuk Bandar.

g The delegation of power to Mr. Wan Kat Few is therefore valid.

- In my judgment, the issue of sub-delegation was a mere red herring. It was bandied about in order to create confusion and disarray. The issue of sub-delegation has no role to play in the context of the present case. It does not arise at all because the powers under s. 107 of the Local Government Act
- h* 1976 and the Local Government Act 1976 Advertisements (Federal Territory) By-Laws 1982 were delegated by the defendant directly to the director of the licensing department, Dewan Bandaraya Kuala Lumpur as exemplified in the government gazette which was alluded to earlier.

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At this juncture, it would be ideal to say something about the authorities that were relied upon by the plaintiff. In regard to the case of *Fadzil bin Mohamed Noor v. Universiti Teknologi Malaysia (supra)*, it can readily be distinguished. There the relevant Act does not provide any power to delegate. In the words of Raja Azlan Shah CJ (Malaya) (as His Majesty then was) of the report as reproduced earlier:

The Act deals with the situation in language which could scarcely be plainer. And it pointedly omits any reference to delegation.

Pertaining to the case of *Francis v. Municipal Councillors Of Kuala Lumpur (supra)*, the question of delegation was not an issue at all. The Privy Council merely decided that the decision that was made was so made by the Council and not by the President and hence the Privy Council held that the dismissal was not in accordance with s. 16(5) of the Municipal Ordinance. In sharp contrast, the relevant statutes, in the present case, provide for the delegation of powers and the instrument of delegation by way of a gazette notification was reproduced. It would be wrong to say, as was submitted, that the case of *Francis* showed that the powers of a corporate body or corporate sole created by statute cannot be delegated. In fact, *Francis* decided that where there had been a purported termination of a contract of service a declaration that the contract still subsisted would rarely be made and would not be made in the absence of special circumstances because of the principle that the courts would not grant specific performance of contracts of service. Since there were no special circumstances, the court in *Francis* held that the appellant's remedy was in damages for wrongful dismissal.

In regard to the case of *Datuk T.P. Murugasu v. Wong Hung Nung (supra)*, I have this to say. There the question of delegation did not arise at all. Whereas in the case of *Inspector-General Of Police & Anor v. Alan Noor bin Kamat (supra)*, the question of delegation became an issue. At p. 261 of the report, Salleh Abas LP said:

As regards the first issue, we are of the view that the learned judge was correct. The respondent was at the material time a probationary police inspector and as such, according to the instrument of delegation of power by the Police Service Commission dated February 18, 1971 (PU(B) 548/75), the IGP was the proper Disciplinary Authority, he being vested with the delegated power to take disciplinary proceedings against 'all senior police officers of the rank of probationary inspector up to and including chief inspector' (vide item 15 of the Instrument of Delegations). But what happened in this case was that the show cause letter dated May 14, 1980, which was signed by Penolong Pengarah Pengurusan (Tatatertib) on behalf of the IGP, had clearly stated that the letter was sent on the direction not of the IGP but of the Deputy IGP.

a The sum total of it all would be this. That if the relevant statute confers the necessary power to delegate, such power can readily be delegated. Here, as I said, the power had been legally delegated and that can never be questioned.

b All the issues that were ventilated in this judgment were decisive in determining the outcome of encl. 21 and they were alluded to at some length.

Conclusion

For the reasons adumbrated above, I dismissed the application in encl. 21 with costs.

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